

Before the
Federal Communications Commission
 Washington, D.C. 20554

In the Matter of) MM Docket No. 95-44
)
 Amendment of Section 73.202(b),) RM-8602
 Table of Allotments,)
 FM Broadcast Stations,)
 (Fair Bluff, North Carolina))

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To: Chief, Allocations Branch
 Policy and Rules Division
 Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF POLICY

MOTION FOR STAY

Atlantic Broadcasting Co., Inc. ("Atlantic"), by and through counsel, and pursuant to §1.429(k) of the Commission's Rules (47 C.F.R. §1.429(k)), hereby submits its "Motion For Stay" of the effectiveness of Report and Order, DA 95-1774, released August 21, 1995, ("Report and Order II"), in the above-captioned rulemaking proceeding. In support whereof, the following is shown:

Background and Standing

1. On August 2, 1995, the Commission issued a Report and Order, DA 95-1656, in MM Docket No. 95-44 ("Report and Order I"), wherein it considered Atlantic's proposal to either delete the vacant allotment of Channel 287A at Fair Bluff, North Carolina, or, in the alternative, to impose a site restriction on the vacant allotment.¹ Atlantic was able to demonstrate that the deletion of Channel 287A at Fair Bluff or the imposition of a site restriction on the allotment would permit Atlantic to

¹ Atlantic has pending an application to modify the license of WDAR-FM to operate with a non-directional antenna. See File No. BMPH-950224ID.

operate its FM station, WDAR-FM, Darlington, South Carolina, with an omnidirectional operation and provide enhanced service to an additional 3,800 persons. In its Report and Order I, the Commission retained Channel 287A at Fair Bluff, since it had received three expressions of interest in the vacant allotment. However, the Commission recognized to the public interest benefits that would result from Atlantic's proposal and it imposed the necessary site restriction on Channel 287A at Fair Bluff that would enable WDAR-FM to operate omnidirectionally.

2. Shortly after the release of its Report and Order I, the Commission rescinded its earlier decision (see, Order, DA 95-1772, released August 10, 1995) and then reversed its decision and denied Atlantic's request for the imposition of a site restriction. See, Report and Order II. In Report and Order II, the Commission opened a window for the filing of applications for vacant Channel 287A at Fair Bluff, North Carolina, beginning on October 5, 1995, and ending on November 6, 1995. Together with this Motion, Atlantic is simultaneously filing a "Consolidated Petition for Reconsideration" ("Consolidated Petition") to seek reconsideration of both the Commission's rescision of Report and Order I and its denial of Atlantic's rulemaking proposal in Report and Order II. Atlantic is now requesting that the Commission stay the effectiveness of Report and Order II and the opening of the window for vacant Channel 287A at Fair Bluff while the Commission considers the important matters raised in Atlantic's Consolidated Petition. Since Atlantic's interests will be directly and adversely affected if the Fair Bluff window is opened and an application is filed that prevents WDAR-FM from operating with enhanced facilities, Atlantic is a party in interest under Section 309 of the Communications Act of 1934 and it has standing

to file this Motion for Stay. See, FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1970).

The Commission's Four Part Test

3. Under §1.429(k) of the rules, "...upon good cause shown, the Commission will stay the effective date of a rule pending a decision on a petition for reconsideration." 47 C.F.R. §1.429(k). When considering whether a party has shown "good cause," to support a request for stay, the Commission makes the following four-part analysis:

- (1) The likelihood of irreparable injury to the petitioner in the absence of relief.
- (2) The injury to other parties in the proceeding that might follow if relief is granted.
- (3) The injury to the public interest that might result if the petition is granted.
- (4) The likelihood that a petitioner might prevail on the merits on reconsideration, review or appeal.

See, Storer Communications, Inc., 101 FCC 2d 434 (1985); WAMTC v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977), and Virginia Petroleum Jobbers Ass'n v. FPC, 259 F. 2d 921 (D.C. Cir. 1958).

Likelihood of Injury To Atlantic

4. If it does not promptly stay the effective date of Report and Order II, the Commission will begin to accept applications for vacant Channel 287A at Fair Bluff, North Carolina. If an application is filed that does not protect the site restriction requested by Atlantic, then Atlantic will be unable to modify WDAR-FM to permit the station to operate omnidirectionally and provide enhanced FM service and Atlantic's

pending application to modify WDAR-FM will be dismissed. Even if applications for Fair Bluff are filed that are not short-spaced to the pending application for WDAR-FM, the processing of the WDAR-FM application will be delayed until one of the Fair Bluff applications is ultimately granted and the new Fair Bluff facility is licensed. At that point, the reference coordinates for Fair Bluff will be changed to the licensed coordinates of the station. Until then, Atlantic will be unfairly prevented from receiving a grant of the pending WDAR-FM application

5. In such a case, Atlantic will experience irreparable harm since its application will be dismissed and its opportunity to provide enhanced service for WDAR-FM will be foreclosed or at the very least inordinately delayed. This harm is "both certain and great" and not simply "theoretical." Wisconsin Gas v. FERC, 758 F. 2d 669 (D.C. Cir. 1985)(per curiam). Staying the effectiveness of the Report and Order II will preserve the status quo and will permit Atlantic to challenge the Commission's decision while avoiding the harm that will be suffered if a short-spaced application is filed.

No Injuries to Other Parties If Relief Is Granted

6. If the Commission's Report and Order II is stayed, no harm will come to the other parties in this proceeding. While the three parties who expressed an interest in the vacant allotment at Fair Bluff will have to await the outcome of Atlantic's petition before filing their applications, this a minor inconvenience. It does not rise to the level of the irreparable harm that Atlantic will experience if the Commission permits the Fair Bluff window to open. The Commission's FM processing line for

mutually-exclusive applicants is currently frozen while the Commission determines its new comparative criteria. See, Public Notice, FCC 94-19, released February 25, 1994. Therefore, given the existence of the Commission's freeze, there will be no delay in the processing of the applications for the Fair Bluff station and no delay in the initiation of new service to the community of Fair Bluff if the Commission delays the opening of the Fair Bluff window pending resolution of Atlantic's Consolidated Petition.

7. In fact, the other parties may benefit from the imposition of a stay. Should the other parties file applications and should the Commission or the Court later agree with Atlantic's arguments, reverse the Commission's earlier decision and impose a site restriction on Channel 287A at Fair Bluff, the applicants would be forced to amend their pending applications to comply with the site restriction. By staying the Fair Bluff window, the Commission will be preserving the status quo for the benefit of all parties.

Injury To Public Interest

8. No injury to the public interest will result if Atlantic's Motion is granted. As noted above, due to the Commission's freeze on mutually-exclusive FM applications, there will be no additional delay in the initiation of new service to Fair Bluff if the Commission grants Atlantic request for stay. Atlantic is not challenging whether the Commission should have retained the vacant Fair Bluff allotment, but only whether a site restriction should have been imposed. Therefore, the Commission will eventually open a window for the new Fair Bluff allotment and there may be new

service to Fair Bluff. Imposing a stay will merely preserve Atlantic's rights and avoid unnecessary harm to both Atlantic and the other parties while the Commission reconsiders its decision in this case.

Likelihood of Success of Atlantic's Petition

9. In its Petition, Atlantic demonstrates that the Commission's decision was arbitrary and capricious and that the Commission's rigid and unorthodox application of policy in this case was unjustified and not in the public interest. The Commission failed to adequately explain its refusal to impose a site restriction in this case. While the Commission cited to past cases where it denied site restriction requests, the facts and circumstances of those cases were completely different. The unique facts of this case call for a different outcome. Imposition of a site restriction will benefit the public interest without harm to the interests of anyone. Atlantic is confident that, upon further examination, the Commission will reconsider its Report and Order II and impose the requested site restriction on Channel 287A at Fair Bluff, and that there is a great likelihood of success in Atlantic's petition.

Conclusion

10. Atlantic has met each of the Commission tests to support its Motion For Stay. By staying its Report and Order II, the Commission will prevent irreparable harm to Atlantic that will occur if an application is filed in the Fair Bluff window that prevents WDAR-FM from operating with enhanced service. In addition, by imposing a stay, the Commission will avoid the harm that may arise if applications for Fair Bluff are filed and later have to be amended if the Commission reverses its decision

and imposes a site restriction. Because the FM processing line is frozen, no harm will result to either the potential applicants for Fair Bluff or the public interest and a stay will permit Atlantic to preserve its rights while it challenges the Commission's actions in this case.

WHEREFORE, the above-facts considered, Atlantic Broadcasting Co., Inc., hereby respectfully requests that the Commission **STAY** the effectiveness of its Report and Order II, DA 95-1774, released August 21, 1995, pending the outcome of Atlantic's Consolidated Petition For Reconsideration in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Denise Felice, a secretary in the law firm of Smithwick, & Belendiuk, P.C., certify that on this 11th day of September, 1995, copies of the foregoing were sent by first class mail, postage prepaid, to the following:

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